

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA--SAN FRANCISCO DIVISION

JAYNE SINGER, on behalf of herself and
all others similarly situated, and on behalf
of the general public,

Plaintiffs,

v.

AMERICAN AIRLINES FEDERAL
CREDIT UNION dba AA CREDIT
UNION; WESTERN FEDERAL CREDIT
UNION and DOES 1 THROUGH 10,
inclusive,

Defendants.

CASE NO. C 05-04961 JCS

~~PROPOSED~~ ORDER GRANTING
JOINT MOTION FOR APPROVAL OF
SETTLEMENT AND FOR ORDER
DISMISSING ACTION

Date: October 27, 2006

Time: 9:30 p.m.

Dept: Courtroom A

I. INTRODUCTION

This is a putative class action brought by plaintiff Jayne Singer in which she challenges the adequacy of certain surcharge notices at ATMs operated by American Airlines Federal Credit Union and Western Federal Credit Union at the Los Angeles International Airport. A class has not been certified. The original, named parties reached a settlement affecting Singer's individual claims only, and have filed the present motion for this Court's approval of their settlement and an order dismissing the complaint.

Under the authorities cited in the parties' papers in support of the motion, the parties submit that it is not necessary to give notice of the proposed settlement to the absent class members because their potential claims will not be prejudiced by the settlement and the settlement is not the product of collusion between Singer and defendants.

II. NATURE OF THE ACTION

Plaintiff Jayne Singer commenced this putative class action in the San Francisco Superior Court on July 16, 2004 against American Airlines Federal Credit Union ("American"). (Case No. 4433097.) The complaint was amended twice and then, on October 26, 2005, Singer filed a

1 Third Amended Complaint naming as a defendant, for the first time, Western Federal Credit
2 Union ("Western"). Western removed the action to Federal Court on December 1, 2005 based
3 on federal question jurisdiction. American joined in the removal.

4 Plaintiff allegedly paid a \$2.50 surcharge to use one of American's Automated Teller
5 Machines in the Los Angeles International Airport on April 27, 2004. As alleged in the
6 complaint, Singer contends that the surcharge was improper because the ATM she used did not
7 have an exterior notice advising her that a surcharge would be imposed. The April 27, 2004
8 transaction is the only ATM transaction which provides the basis for plaintiff's claim in this
9 action.

10 Singer alleges that she brings the action on behalf of herself, and all others similarly
11 situated, who paid a surcharge for the use of an ATM machine owned or operated by the
12 defendants American and Western. Singer does not dispute that the ATM she used displayed a
13 screen notice that a fee would be charged, and the screen notice appeared before the user was
14 committed to proceeding with the transaction. However, she claims that the ATM did not also
15 display an exterior sign informing her of the surcharge, as she contends is required by of the
16 Electronic Fund Transfer Act, 15 U.S.C. § 1693 et seq. (the "EFTA"). Singer alleges in the First
17 Cause of Action that this surcharge constitutes a violation of California Business & Professions
18 Code §17200 because it is illegal, unfair or deceptive under 15 USC 1693b(D)(3)(A) and (B) and
19 15 USC 1693b(C) of the EFTA. Singer alleges in the Second Cause of Action that the
20 "Defendants failed to post on ATM machines owned and operated by them notices required by
21 15 USC 1693b(d)(3)(A)(i)(B)(i) and accordingly imposition of any ATM fee upon the class
22 members was prohibited by 15 USC 1693b(d)(3)(C)." Complaint, ¶13.

23 Defendants deny that they are liable as alleged in the complaint, and deny that plaintiff,
24 or any putative class members, are entitled to any recovery from them in connection with the
25 matters alleged in the complaint. Defendants contend that based on the screen notice, plaintiff
26 agreed to the fee she incurred and, therefore, she has no actual damages. For that same reason,
27 defendants contend that the purported class has no standing to make a claim for damages.

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III. PROCEDURAL STATUS OF CASE

The court scheduled a hearing on a motion for class certification for September 29, 2006. However, the parties reached a tentative settlement before plaintiff filed her motion for class certification. Thus, no class has been certified. Trial is scheduled to commence on April 23, 2007.

IV. TERMS OF SETTLEMENT

The key features of the settlement are as follows:

1. Defendants will make a payment of \$30,000 (thirty thousand dollars) to the non-profit consumer group the National Consumers League for the benefit of its "Life Smarts" program¹;
2. Steps will be taken to ensure that all American ATMs have proper exterior signage advising of potential charges. The parties have agreed as follows: whenever CREDIT UNIONS' employees are escorting service and supply vendors to the CREDIT UNIONS' Automatic Teller Machines ("ATM") located at the Los Angeles International Airport, CREDIT UNIONS' employees will routinely confirm that accurate exterior notices of fees are in place on their Los Angeles International Airport ATMs. The CREDIT UNION whose employees are checking exterior notices will promptly install or replace any exterior signs that are found to be missing.
3. The defendants will pay a \$1,500 "incentive fee" to Singer.
4. The defendants will pay \$14,000 (fourteen thousand dollars) to Singer's counsel, Daniel Berko, for his attorney's fees for this case.
5. Singer will release all claims against defendants, known and unknown, and her complaint against defendants will be dismissed with prejudice.

¹ The web site for this program describes it as follows: "LifeSmarts . . . the ultimate consumer challenge is an educational opportunity that develops the consumer and marketplace knowledge and skills of teenagers in a fun way and rewards them for this knowledge. The program complements the curriculum already in place in high schools and can be used as an activity for classes, groups, clubs, and community organizations. LifeSmarts, run as a game-show style competition, is open to all teens in the U.S. in the 9th through 12th grades. Teams of four to five teens compete in district and state matches with the state winners going to the national competition to vie for the national LifeSmarts title. LifeSmarts is a program of the National Consumers League." <http://www.lifesmarts.org/start/about.htm>

6. The parties will not discuss the settlement with any third party, except in limited circumstances (in response to subpoena or court order, in compliance with law in the conduct of business affairs, by prior approval of the defendants, or with certain professional advisors).

7. The settlement is conditioned upon court approval thereof.

V. STANDARD OF REVIEW

This is a settlement involving the original parties to this suit, reached before any class decision or notice has been given to class members. In this circumstance, the court is to review the settlement and proposed dismissal in order to confirm that the representative plaintiff is not receiving a disproportionate recovery and that absent class members will not suffer prejudice. If the Court makes this determination, it should approve the settlement and dismiss the action without notice. F.R.C.P. Rule 23(e); *Diaz v. Trust Territory of Pacific Islands*, 876 F.2d 1401, 1408 (9th Cir. 1989).

VI. APPROVAL OF THE SETTLEMENT WITHOUT REQUIRING NOTICE TO ABSENT CLASS MEMBERS

The parties reached this settlement after independently considering a number of factors, including: (1) the strength of the case for plaintiff on the merits, balanced against the extent of the settlement offer; (2) the complexity, length and expense of further litigation; and (3) the progress of the proceedings.

It appears that any inadequate signage at the ATMs was not fraudulently motivated or intended to gouge consumers. This is not a defense per se, but has a bearing on the equities of the situation which could affect potential damages awarded. Further, the defendants are federally-chartered credit unions which generally strive to serve consumer interests. In addition, defendants contend that based on the screen notice, plaintiff agreed to the fee she incurred and, therefore, she has no actual damages. For that same reason, defendants assert that the purported class has no standing to make a claim for damages. Moreover, defendants assert that the ATM

1 operations at Los Angeles International Airport have resulted in an operational loss in each year
2 of its existence. There are no profits to be disgorged.

3 Further litigation will require a fight over class certification and the merits, with
4 substantial trial attorney's fees. A controversy over whether Singer is entitled to recovery for a
5 unintentional violation does not warrant this.

6 **A. There Is No Known Reliance By Absent Class Members on the Filing of the**
7 **Action**

8 Plaintiff's attorney Daniel Berko is plaintiff's sole counsel in these proceedings. Plaintiff
9 is Mr. Berko's spouse's friend, and plaintiff contacted Mr. Berko after she used the ATM on
10 April 27, 2004. Mr. Berko is unaware of any other specific individuals, and has not
11 communicated with any individuals other than plaintiff, who may have a claim against
12 defendants based on the alleged absence of surcharge notices at American ATMs. (See Berko
13 Declaration, p.4.) Counsel for the parties are unaware of this case having been covered by any
14 articles in the press, and are unaware of any reliance by absent class members on the filing of
15 this lawsuit.

16 **B. There Is Time For Absent Class Members To File Other Actions**

17 The complaint was filed against American on December 17, 2004 and against Western on
18 October 26, 2005. The statute of limitations was tolled as to the class during the period that the
19 complaint was on file. *American Pipe & Const. Co. v. Utah*, 414 U.S. 538 (1974); *Bantolina v.*
20 *Aloha Motors, Inc.* 75 F.R.D. 26, 31-33 (D. Haw. 1977) (Truth in Lending Act). The EFTA
21 statute of limitations is one year from the date of the occurrence of the violation. 15 U.S.C. §
22 1693m(g). This means that American could face potential claims in connection with ATM
23 transactions dating back to July 16, 2003—one year before the original complaint was filed
24 against it on July 16, 2004. To the extent that Western faces liability under the Act, it would be
25 in connection with ATM transactions dating back to October 26, 2004—one year before the
26 Third Amended Complaint was filed on October 26, 2005.

27 The Unfair Practices Act (UPA) statute of limitations is four years. Cal. Bus. & Prof.
28 Code § 17208. This means that American could face potential liability in connection with ATM

1 transactions dating back to July 16, 2000—four years before the original complaint was filed
2 against it on July 16, 2004. (Actually, this is long before American had installed the subject
3 ATMs, which began in January 2003.) To the extent that Western faces liability under the Act, it
4 would be in connection with ATM transactions dating back to October 26, 2001—four years
5 before the Third Amended Complaint was filed on October 26, 2005.

6 Based on the tolling of the statute of limitations as to the class which occurred by virtue
7 of the filing of plaintiff's complaint, there is ample time for absent class members to commence
8 a new action should they determine that such a case had merit.

9 **C. Class Interests Are Not Being Settled or Conceded in Order to Further the**
10 **Interests of Plaintiff or Her Counsel**

11 Plaintiff will receive a \$1,500 "incentive fee" under the settlement, and Mr. Berko's
12 attorney's fees of \$14,000 will be paid. These amounts are within reasonable limits, and do not
13 constitute a windfall, in light of the fact that the settlement: (1) includes provisions designed to
14 ensure that the American ATMs have proper exterior notices posted; and (2) provides for a
15 \$30,000 payment to a National Consumers League youth educational program. The settlement
16 provides cash to the named plaintiff and also provides classwide injunctive relief from the
17 business practices alleged in the complaint. In this case, the named plaintiff's individual
18 recovery and plaintiff's attorney's fees cannot be characterized as a windfall.

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20 Incentive payments to named class-action plaintiffs have been approved in the Northern
21 District of California. In one 1994 Northern District of California case, the court approved
22 incentive awards of \$500 each to eight class representatives. Each representative spent between
23 two and five hours undergoing deposition and each responded to a few narrow discovery
24 requests. *In re Oracle Securities Litigation*, 1994 WL 502054 (N.D. Cal. 1994.) In this case,
25 plaintiff responded to written discovery requests before the action was removed to this Court,
26 and she submitted to half-day deposition in San Francisco, traveling from her home in Southern
27 California to do so. The parties believe that the \$1,500 payment to plaintiff is within a range that
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1 should be approved by the Court. Mr. Berko's attorney's fees, his time spent on the case and his
 2 current hourly billing rate are described in his accompanying declaration.²

3 **D. Notice To Class Members Is Not Warranted**

4 The *Diaz* decision does not require notice to absent class members of a settlement
 5 between the named plaintiff and the defendants if the named plaintiff does not receive a
 6 disproportionate recovery and the class members do not suffer prejudice. Plaintiff is being paid
 7 an incentive payment of \$1,500 for her participation in this action. Approving the proposed
 8 settlement at this time, without notice, will serve the public policy objective of encouraging
 9 settlement. The proposed settlement does not provide plaintiff with a disproportionate recovery
 10 and will not result in prejudice to the absent class members, who may still file suit.

11 **ORDER**

12 For all of the reasons discussed above, the Court hereby finds and ORDERS: (1) that the
 13 settlement between Singer and defendants is not collusive or prejudicial; (2) the settlement is fair
 14 and reasonable, including the payment of attorney's fees to plaintiff's counsel; and (3) the Court
 15 dismisses the complaint, with Jayne Singer's individual claims being dismissed with prejudice,
 16 and the claims of absent class members being dismissed without prejudice.

17 IT IS SO ORDERED

18 DATED: October 30, 2006

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 22 JOSEPH C. SPERO
 23 United States Magistrate Judge
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27 ² Under the EFTA, an individual plaintiff who establishes liability is entitled to recover costs and reasonable
 28 attorney's fees. (See 15 U.S.C. 1693m(a)(1)-(3).)